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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/890,434	01/27/2003	Rene Gschwind	DT-4080	1633

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Jordan and Hamburg LLP
122 East 42nd street
New York, NY 10168

EXAMINER

KUHNS, SARAH LOUISE

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 12/14/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/890,434

Applicant(s)

GSCHWIND, RENE

Examiner

Sarah L. Kuhns

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 31 October 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,2 and 12-34 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1,2 and 12-34 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
- 1) ☒ Certified copies of the priority documents have been received.
 - 2) ☐ Certified copies of the priority documents have been received in Application No. _____.
 - 3) ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claim Rejections - 35 USC § 103

Claims 1, 15, 18, 20, 21, 25 and 34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sakuma, JP 60120950 A, in view of Gaull, U.S. Patent 4,629,625, "Surprise Ingredient in Coca Cola," "Book Tells Coke Recipe, but is it the Real Thing?" and "Jets Fuel is Like Kerosene."

Sakuma discloses a spread comprising one beverage, which may be milk, cola, fruit juice, or vegetable juice, sugar, a thickening agent, an acidification agent, and a cola aroma. Sakuma discloses the spread containing a cola beverage, which would be expected to contain the several of the claimed ingredients, since cola beverages generally contain caffeine, citric acid, water and caramel syrup/aroma, as evidenced by "Surprise Ingredient in Coca Cola," "Book Tells Coke Recipe, but is it the Real Thing?" and "Jets Fuel is Like Kerosene." Cola beverages commonly use sugar and/or starch syrup and cola beverages containing lime juice/aroma are also known, as evidenced by "Book Tells Coke Recipe, but is it the Real Thing?" As such, it would have been obvious to use such a cola in the product of Sakuma if such a flavor was found to be desirable.

Sakuma does not disclose the spread comprising taurine. However, Gaull discloses the inclusion of taurine in spreads (column 6, line 57 - column 7, line 6) in order to provide several benefits associated with taurine, such as improvements in maintaining cell homeostasis (column 2, line 58 - column 3, lines 25). As such, it would have been obvious to include taurine in the product of Sakuma in order to achieve the same benefits taught by Gaull.

Claims 1, 15-18, 20, 21, 25, 26, 29 and 34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Altvater, DE 19736429 A1, in view of Gaull, U.S. Patent 4,629,625, "Surprise Ingredient in Coca Cola," "Book Tells Coke Recipe, but is it the Real Thing?" and "Jets Fuel is Like Kerosene."

Altvater discloses a spread comprising one beverage, sugar, a thickening agent, an acidification agent, and a cola aroma. Altvater discloses the beverage being cola or fruit juice and further discloses that the cola beverage may contain saccharin or acesulfame potassium. Altvater discloses the thickening agent being pectin and discloses the spread comprising citric acid, lactic acid, or tartaric acid.

Altvater discloses the spread containing a cola beverage, which would be expected to contain the several of the claimed ingredients, since cola beverages generally contain caffeine, citric acid, water and caramel syrup/aroma, as evidenced by "Surprise Ingredient in Coca Cola," "Book Tells Coke Recipe, but is it the Real Thing?" and "Jets Fuel is Like Kerosene." Cola beverages commonly use sugar and/or starch syrup and cola beverages containing lime juice/aroma are also known, as evidenced by

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"Book Tells Coke Recipe, but is it the Real Thing?" As such, it would have been obvious to use such a cola in the product of Altvater if such a flavor was found to be desirable.

Altvater does not disclose the spread comprising taurine. However, Gaull discloses the inclusion of taurine in spreads (column 6, line 57 - column 7, line 6) in order to provide several benefits associated with taurine, such as improvements in maintaining cell homeostasis (column 2, line 58 - column 3, lines 25). As such, it would have been obvious to include taurine in the product of Altvater in order to achieve the same benefits taught by Gaull.

Claims 1, 15, 16, 18, 20, 21, 25 and 34 are rejected under 35 U.S.C. ^{103(a)}~~102(b)~~ as being unpatentable over Ono et al., U.S. Patent 4,197,325, in view of Gaull, U.S. Patent 4,629,625, "Surprise Ingredient in Coca Cola," "Book Tells Coke Recipe, but is it the Real Thing?" and "Jets Fuel is Like Kerosene."

Ono discloses a spread comprising one beverage, sugar, a thickening agent, an acidification agent, and a cola aroma (claim 1). Ono further discloses the beverage being milk, cola, fruit juice, or vegetable juice (claim 1) and the thickening agent being gelatin (claim 1).

Ono discloses the spread containing a cola beverage, which would be expected to contain the several of the claimed ingredients, since cola beverages generally contain caffeine, citric acid, water and caramel syrup/aroma, as evidenced by "Surprise Ingredient in Coca Cola," "Book Tells Coke Recipe, but is it the Real Thing?" and "Jets

Fuel is Like Kerosene.” Cola beverages commonly use sugar and/or starch syrup and cola beverages containing lime juice/aroma are also known, as evidenced by “Book Tells Coke Recipe, but is it the Real Thing?” As such, it would have been obvious to use such a cola in the product of Ono if such a flavor was found to be desirable.

Ono does not disclose the spread comprising taurine. However, Gaull discloses the inclusion of taurine in spreads (column 6, line 57 - column 7, line 6) in order to provide several benefits associated with taurine, such as improvements in maintaining cell homeostasis (column 2, line 58 - column 3, lines 25). As such, it would have been obvious to include taurine in the product of Ono in order to achieve the same benefits taught by Gaull.

Claims 1, 2, 15-18, 20, 21, 29 and 34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fukuyama, et al., EP 0496426 A1, in view of Gaull, U.S. Patent 4,629,625, “Surprise Ingredient in Coca Cola,” “Book Tells Coke Recipe, but is it the Real Thing?” and “Jets Fuel is Like Kerosene.”

Fukuyama discloses a spread comprising one beverage, sugar, a thickening agent, an acidification agent, and a cola aroma (page 2, lines 48-55). Fukuyama further discloses the beverage being milk, cola, or fruit juice (page 2, lines 53-55) and the thickening agent being pectin or gelatin (page 2, lines 50-52). Fukuyama discloses the spread comprising citric acid (see chart on page 5).

Fukuyama discloses the spread containing a cola beverage, which would be expected to contain the several of the claimed ingredients, since cola beverages

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generally contain caffeine, citric acid, water and caramel syrup/aroma, as evidenced by "Surprise Ingredient in Coca Cola," "Book Tells Coke Recipe, but is it the Real Thing?" and "Jets Fuel is Like Kerosene." Cola beverages commonly use sugar and/or starch syrup and cola beverages containing lime juice/aroma are also known, as evidenced by "Book Tells Coke Recipe, but is it the Real Thing?" As such, it would have been obvious to use such a cola in the product of Fukuyama if such a flavor was found to be desirable.

Fukuyama does not disclose the spread comprising taurine. However, Gaull discloses the inclusion of taurine in spreads (column 6, line 57 - column 7, line 6) in order to provide several benefits associated with taurine, such as improvements in maintaining cell homeostasis (column 2, line 58 - column 3, lines 25). As such, it would have been obvious to include taurine in the product of Fukuyama in order to achieve the same benefits taught by Gaull.

Claims 2, 12-14, 19, 22-24, 27, 28 and 30-33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sakuma, Altvater, Ono, and Fukuyama, in view of Gaull, U.S. Patent 4,629,625, "Surprise Ingredient in Coca Cola," "Book Tells Coke Recipe, but is it the Real Thing?" and "Jets Fuel is Like Kerosene," as applied above, in further view of Brinkers, U.S. Patent 5,223,300, Heine et al., U.S. Patent 3,600,196, Nishimoto et al., U.S. Patent 5,935,636, Gaither et al., U.S. Patent 5,688,548, and Bakal et al., U.S. Patent 5,137,742.

The ingredients claimed by Applicant were well known to one of ordinary skill in the art as discussed above. Sakuma, Altwater, Ono, and Fukuyama all disclose the use of a cola beverage in a spread, which would be expected to contain water, sugar, caramel syrup, citric acid, cola aroma, and caramel aroma, as discussed above. Altwater further discloses the use of diet cola beverages containing aspartame and Sakuma discloses the inclusion of a starch syrup, a sauce material made from fruit and thick malt syrup. Additionally, Brinkers discloses the use of carob bean flour as a thickener in a spread (example C) and the inclusion of milk and/or curds in a spread (column 3, lines 34-39), Heine discloses the inclusion of nougat in a spread as a source of fat (column 2, lines 15-25), Nishimoto discloses the inclusion of trehalose, isomalt and sorbitol (sorbite) as sweeteners in a spread (column 9, lines 60-67 and column 10, lines 25-57), Gaither discloses the use of applesauce as a low fat alternative to butter, oil, or shortening in food products (abstract), and Bakal discloses the use of guar flour as a thickener in a spread composition (column 3, lines 1-4).

Attention is directed to *In re Levin*, 84 USPQ 232, which states: New recipes of formulas for cooking food, which involve addition or elimination of common ingredients, or for treating them in ways which differ from former practice, do not amount to invention merely because it is not disclosed that no one else ever did what Applicant did; Applicant must establish co action or cooperative relationship between ingredients which produces new, unexpected and useful function.

As all of the ingredients used in the spread claimed by Applicant were well known in the art of spreads, and no unexpected result has been provided, it would have been

obvious to alter the amounts and specific combination in order to achieve a spread with a desired taste and/or texture.

Additionally, with regard to claims 12-14, "Even though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process." *In re Thorpe*, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985). Applicant is invited to submit any clear and convincing evidence that the process limitations claimed produce a spread that is patentably distinct from that of the prior art.

Response to Arguments

Applicant's arguments with respect to the anticipation rejections included in the previous Office Action have been considered but are moot in view of the new ground(s) of rejection.

Applicant's other arguments have been fully considered but they are not persuasive.

The Examiner would like to note that Brinkers does disclose that locust bean gum is being used as a thickener at column 3, lines 40-44.

Also, Applicant claims that Heine merely discloses nougat and not "nut nougat." However, nougat is defined by Webster's II New Riverside University Dictionary as

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being a confection made from a sugar or honey paste into which nuts are mixed and as such, nougat is understood to be "nut nougat." There is motivation to include nougat in that it is a known source of fat for spreads and therefore provides desirable texture properties to the spread while also enhancing the flavor.

As shown above, all the ingredients claimed by Applicant have been demonstrated to be known in the art of spreads. Applicant claims that the object is to create a spread that stimulates circulation; however, no evidence has been provided demonstrating that this objective is indeed achieved and that the prior art does not also achieve this objective.

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

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the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Sarah L. Kuhns whose telephone number is 571-272-1088. The examiner can normally be reached on Monday - Friday from 8:00 am - 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached at 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

SLK


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